United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

76-7348

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs-Appellees,

-against-

THE BOARD OF EXAMINERS,

Defendants-Appellants,

-and-

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK and the CHANCELLOR OF THE CITY SCHOOL DISTRICT,

Defendants-Appellees.

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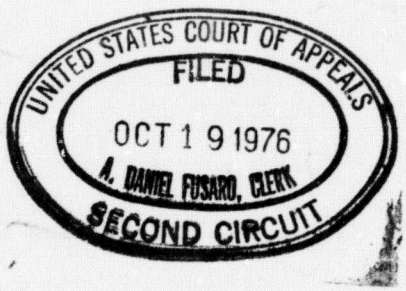

B P/S

On Appeal From The
United States District Court
For The
Southern District of New York

BRIEF OF AMICUS CURIAE COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK

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BRIEF OF AMICUS CURIAE
COUNCIL OF SUPERVISORS AND
ADMINISTRATORS OF THE CITY OF NEW YORK

Interest of the Amicus Curiae

Since 1971, the CSA has been the exclusive bargaining representative for all supervisory and administrative personnel in the New York City school system, whether appointed after competitive examination prior to the commencement of this litigation in 1970, or assigned in accord with the interim assignment process in effect pursuant to court order in this case. In that year, the CSA proved to the Board of Education, through the certification process

required by state law, that in all license categories, it represented the overwhelming majority of the minority supervisors and administrators who had been assigned through the interim court-mandated appointment procedure, as well as already representing those who were appointed in prior years. Through CSA's collective bargaining representation, the interim minority assignees obtained salary levels and personal increments on a par with regularly appointed individuals, as well as the same measure of due process protection against termination or discontinuance of service as had been accorded to such personnel.

On two occasions during this protracted litigation, the CSA has participated as intervenor. First, when the plaintiffs successfully destroyed the interdistrict transfer provisions of its collective bargaining agreement; and again when excessing of supervisory personnel in New York City schools became a budgetary necessity. While the plaintiffs were unsuccessfully embroiled in a year of motions, countermotions, and appeals to retain jobs for minority workers by the device of unconstitutional racial quotas (Chance v. Board of Education, 534 F.2d 993), the CSA achieved this same result by membership agreement to give up budgeted salary increments in return for a Board of Education commitment to forego layoffs of supervisory personnel, i.e., by the constitutional and democratic process of securing the consent of all affected persons and collectively bargaining to achieve

the group goals. See Amsterdam News Editorial, September 18, 1976 (annexed as Addendum A).

The CSA seeks to voice in this brief the opposition of its membership to further attempts by a non-representative group to establish an appointment system for New York City school supervisors and administrators which is the antithesis of the merit and fitness system of appointments mandated by the New York Education Law and Constitution. For it is the concensus of our membership that equality of job opportunity for all persons is best achieved by strengthening, not dismantling, the merit system of appointments.

POINT I

The Case Should be Remanded With Directions to Dismiss the Complaint, as No Principle of Law or Equity Requires the Court to Adhere to Its Now Overruled Decision in the First Chance* Case.

This is not a case where, long after the parties have litigated a case to its conclusion, one of them returns to court and seeks to divest the other of rights vested by operation of the judgment.** Here, as in Stolberg v. Board of Trustees, --- F.2d --- (2nd Cir. June 2, 1976, Dkt. No.

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* 458 F.2d 1167 (2nd Cir. 1972)

** The Board of Examiners, in its brief to this Court, specifically disclaims any intent "to disturb licenses issued, or other rights, privileges or prerequisites obtained, under the Judgment". (Br. 27, f.n.**)

75-7426, Slip Opin. 3975, 3981), "no second or different action has been brought". The relief sought below, as in Stolberg, "is essentially an enforcement of the judgment already entered in this case . . ." And, as Stolberg holds, the doctrine of res adjudicata is inapplicable in such a situation.

This is a case precisely like System Federation v. Wright, 364 U.S. 642 (1961) and Theriault v. Smith, 523 F.2d 601 (1st Cir. 1975), where the court must modify or set aside a decree of injunction, despite the fact that it results from a consent decree, because of an intervening change in the applicable law. And there can be no serious argument in this case that Washington v. Davis, 44 U.S.L.W. 4789 (1976) is not a sufficient intervening change in the law to prevent altogether the application of the doctrine of res adjudicata or collateral estoppel to this case. Compare Bronson v. Board of Education, 525 F.2d 344, 346-349 (6th Cir. 1975), noted in 7 U.Tol.L.Rev. 683 (1976).

Even in cases involving two separate proceedings between the same parties regarding the same issue, and hence not controlled by the Stolberg rationale, this Court has recognized that:

> "When the legal rule applicable to the same facts has been changed between the two proceedings, the doctrine of estoppel by judgment may not be successfully evoked . . . This is obviously true when the change in the applicable legal rule is made by statute. It is no less true when

the change is by judicial decision." Bush v. Commissioner, 175 F.2d 391, 393 (2nd Cir. 1949).

The rationale behind decisions like Bush, supra, is equally applicable here:

> "If collateral estoppel were applied in this situation, a judgment would petrify the law as to the [party] who won or lost, so that a subsequent change of law would not affect him, and his treatment under the supplanted legal principle would be unfairly advantageous or disadvantageous." 1B Moore's Federal Practice, Section 0.448, p. 4237.

Nor are consent judgments entitled to any greater res adjudicata effect than judgments entered after litigation. United States v. International Building Co., 345 U.S. 502 (1953); System Federation v. Wright, supra; Theriault v. Smith, supra. One highly respected commentator commended this rule, stating:

> "The decision of the Supreme Court . . . seems proper in light of the policy considerations previously set forth. It seems hard to believe that the tremendous burden of litigation confronting [the courts] would be eased by imposing as the price of compromise or settlement the relinquishment of the right to re-examine the question if it should become pertinent in reference to [litigation in] subsequent . . . years." Polansky, Collateral Estoppel -- Effects of Prior Litigation, 39 IowaL.Rev. 217 (1954).

This is a case where, while the various parties litigated interminably* on how permanently to implement the district court's six-year-old temporary injunction, the Supreme Court removed the necessity for any further court action in the case by overruling its legal cornerstone. No legal or equitable doctrine precludes dismissal of the entire action at this time in light of the intervening change of law; indeed, any other result would be an abuse of discretion. System Federation v. Wright, supra, 364 U.S. at 650.

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* Perhaps the best description of the leviathan proportions this litigation has assumed is in the application of one of plaintiff's counsel for counsel fees in excess of $250,000. Counsel writes of the four appeals; dozens of court appearances; briefs, memoranda, and exhibits of thousands of pages; a gamut of problems including "difficult issues of constitutional law . . . the intricacies of statistical analysis and psychological testing, and . . . reconciliation of the competing legal and practical interests of two separate sets of defendants . . ." Counsel also attached a list of thirty-five orders and opinions rendered in the case, which he characterized as only a "partial listing" of such documents. Affidavit of June 21, 1976. Original record, Document No. 255.

POINT II

The District Court's Modification of the Judgment Below Requires City Officials to Violate the State Constitution and Education Law on Merit and Fitness; and it Also Contravenes This Court's Decision in the Second Chance* Case.

While it is difficult to perceive any ground on which the doctrine of res adjudicata might apply to propel this litigation into its seventh year, we here add a brief argument to that ably presented by the appellant Board of Examiners on how the district court's action violates state law, in the event the Court declines to dismiss the case on authority of Washington v. Davis, supra, and decides to reach that issue.

The constitutional command to select civil service employees in New York State on merit and fitness, ascertained by competitive examination, is qualified by the words "as far as practicable". N.Y. Constitution, Article 5, Section 6. However, only the legislature has the power to make a factual determination that it is not practicable to decide fitness on the basis of a competitive test. Matter of Henock v. Bergtram, 36 A.D.2d 409 (2nd Dept. 1971).

Thus the state legislature could properly, under the New York Constitution, decide it was not practicable to determine merit and fitness of supervisory appointments in

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* Chance v. Board of Examiners, 496 F.2d 820 (2nd Cir. 1974).

the City schools by competitive examination. It could have determined that merit and fitness are equally well ascertained on the basis of other criteria, like state certification and on-the-job experience evaluation. But it did not. By enacting Education Law Sections 2590 and 2569, it required merit and fitness to be determined through competitive examinations formulated and conducted by a Board of Examiners. Once that legislative determination was made, then no state agency has power to ignore or bypass the legislative mandate. Matter of Board of Education v. Nyquist, 31 N.Y.2d 468, 472-473 (1973).

In the arguments before the district court on the merits of the modified plan, it seems to us that its proponents simply ignored the Nyquist holding and argued in support of the modification as if they were a kind of super-legislature with power to replace the competitive examination system mandated by Sections 2590 and 2569 with their conception of a reasonable alternative.

Although the New York Court of Appeals in Nyquist annulled the permanent appointment of a principal who completed eleven years of on-the-job service in that position and whose job performance was satisfactory to the employing agency because she had failed to pass the competitive examination mandated by state law, plaintiffs' counsel nevertheless urged acceptance of the modified plan in this fashion:

> ". . . basically the new Step 1 says, 'If you have minimum training and experience,

> then it is up to the Community School Board. If they want to give you a chance, given the fact that you meet these minimum standards, they can give you a chance and the real test for you is the performance on the job."
>
> * * *
>
> "And that is a kind of examination process . . . moving the whole educational administration to a system where we don't try to screen people out by paper-and-pencil procedures at the door. We give them a chance and see what happens on the job." (878a-879a)

The problem with the kind of process described by plaintiffs' counsel and contained in the modified plan is that it bears no relationship to that required by the New York Education Law and heretofore used in New York City. A brief description of the qualifying process chosen by the legislature is necessary to understand just how great the deviation between it and the modified plan actually is.

Under State law, the Chancellor and Board of Education decide what positions to create and how the duties of those positions will be defined. The Chancellor sets the minimum education and experience required in order to apply for the positions. Within the limits described later, the Board of Education decides who will be appointed to the vacant positions. However, State Education Law gives to the Board of Examiners the sole duty, first, under Education Law Section 2590-j, to determine how best to objectively evaluate the abilities which applicants for these positions are required to possess, i.e., to decide what objective tests

best measure those abilities; and second, under Education Law Section 2569, to administer and evaluate the tests and to prepare a list of eligible candidates who successfully pass the tests and certify the list to the Board of Education. The Board of Education or other appropriate appointing authority* then has complete discretion, in the case of supervisors and administrators, to choose any person** on an appointment list certified by the Board of Examiners to fill a vacant position. Once a choice is made from a legally eligible group, then the decision of the appointing authority is virtually unassailable. See Matter of Delicati v. Schecter, 3 A.D.2d 19 (1st Dept. 1956). The successful applicant is given a probationary appointment, which does not become permanent for a three-year period under New York Board of Education By-Laws, in order to allow on-the-job evaluation by the appointing authority.

The purpose of this three-tiered system was to remove the formulation and administration of examinations from

* In New York City, under the Decentralization Plan of 1969, the Board of Education is the appointing authority for all high schools and specialty schools and the thirty-two local Community Boards are the appointing authorities for all other schools within their respective districts.

** This is the difference between a ranked and a qualifying examination. After a ranked examination, the appointing authority is given a list of persons ranked according to their examination scores and must consider the highest ranked person first. A qualifying examination is only a pass-fail examination, and the appointing authority has the ability to choose among all persons who passed without regard to who has the highest score. The qualifying examination for supervisors and administrators replaced the ranked examination under the Decentralization Plan in order to give the local boards the widest possible latitude in choice of applicants.

the control of the same agencies which set the job requirements and which have complete discretion over the actual appointments. Without an independent Board of Examiners to screen applicants on the basis of objective criteria, the same body which defines the jobs and makes the actual appointments would also be in a position to set standards of eligibility. Experience has proved that this invariably results in narrowing the field of persons who are considered for positions to those politically acceptable to the appointing authority. See especially, Matter of Board of Education v. Nyquist, supra, 31 N.Y.2d at 473.

The balance New York intended to strike by strict adherence to the merit and fitness selection process is best described in Matter of Delicati v. Schecter, supra, 3 A.D.2d at 19:

> "The provisions of the State Constitution, the statutes and rules requiring that appointments be made from among qualified people, pursuant to competitive examination wherever practicable, are not intended to dictate the selection by appointing officials, but to limit the group from which selection can be made to those who are qualified." (Emphasis added)

To summarize the three-stage procedure: first, the Board of Education defines the job and the job duties and the Chancellor sets minimum education and experience requirements for the applicants, which may be the same or higher than the standards for state certification for the position. Second, the Board of Examiners decides which testing methods

most accurately measure the abilities necessary for successful performance of those duties, formulates and conducts the tests, and certifies a group of qualified applicants from among which selection can be made. Finally, the appointing authorities then select only from those applicants, and give them a probationary appointment, so that they can further evaluate the person on the basis of his actual job performance.

Under the modified plan, adopted by the court below, "The actual performance on the job [is] to be the major determinent of who is good or who is bad." (878a) Or, in the words of one affidavit in support of the modification:

> ". . . The Board of Education's proposed modified plan correctly reflects an understanding that evaluation of performance on the job is a much better method of determining who can do a job well than pre-job tests." (866a)*

Other than the on-the-job evaluation, the only other "examination" procedure in the modified plan is an inspection of the applicant's credentials to see whether he possesses the requirements for state certification plus the eligibility requirements of the Chancellor. (882a)

The only perceivable difference between the requirements of the modified plan and the facts of the Nyquist

* See also argument of Board of Education:

> "Our experts have told us that it is impossible to predict in a pre-structured exam such as the kind the old plan envisioned, a supervisor's actual performance on the job . . ." (884a)

case, supra, is that there the on-the-job evaluation lasted for eleven years, whereas under the modified plan the on-the-job evaluation will, presumably, consume less time. The vice of the modified plan is that it leaves out the second stage of the three-stage procedure described above, as did the Chancellor in the Nyquist case, and in this very vital respect it is illegal under New York law. The district court's attempt to bypass the state law problem by allocating the responsibilities for on-the-job evaluation to the Board of Examiners (930a) on the authority of the second Chance opinion (supra, 496 F.2d 420), falls short of the mark in both respects.

The appellant Board of Examiners has ably presented the state law arguments demonstrating the illegality of the modified plan and we will not repeat them. We would point out only that the second Chance decision is not authority for the district court's acceptance of the modified plan.

In Chance II, the Court acknowledged that permanent licensing of school supervisors without any examination would "probably run afoul of the decision of the New York Court of Appeals in Board of Educ. v. Nyquist . . ." 496 F.2d 823. The Court further acknowledges that if this were the case, then it would have to face the issue of the extent to which state law can be overridden to redress past discrimination unconstitutional under federal law. 496 F.2d at 824. The Court recognized that when Chance II was decided,

the New York Court of Appeals had not yet spoken on that issue. 496 F.2d at 824 n. 9.*

The Court in Chance II avoided these difficult issues by holding only that the district court did not err in finding that the interim appointment scheme "appears to comply with New York law." 496 F.2d 824 (Emphasis added) Although the Court expressed reservations, it felt compelled to decide the State law question in the absence of a certification statute, citing its decision in Schein v. Chasen, 478 F.2d 817 (2nd Cir. 1973), rev'd sub. nom. Lehman Brothers v. Schein, 416 U.S. 386 (1974). We suggest that it may now be appropriate to leave the resolution of the legality under State law of the modified plan to the State courts, under the procedures recommended by the Supreme Court in the Lehman Brothers case, supra, instead of once again being forced to "do no more than make an educated guess in a difficult area." Chance v. Board of Education, supra, 496 F.2d at 824. See in this regard Stolberg v. Board of Trustees, supra, Slip Opin. at 3982, where the Court endorsed the district court ruling that unresolved questions of state law germaine

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* This question has now been decided. In Schenectady v. State Div. of Human Rights, 37 N.Y.2d 421, 430 (1975), the New York Court held that although public employers are not excluded from the sanctions against illegal discrimination, they cannot be compelled to disregard other valid provisions of state civil service law in order to remedy past discrimination. Thus under state law, the fact that the plan was formulated for this purpose would not save it from being held invalid if it conflicted with Ed. Law Sections 2569 and 2590-j.

to federal claims are most appropriately determined by state courts.

We make only one further observation regarding the modified plan. Its proponents claimed that "paper-and-pencil" examination procedures were outmoded and the whole educational system was moving to eliminate such examinations for job applicants. (878a-879a)

In its 1976 Tentative Statewide Plan for the Development of Postsecondary Education (annexed as Addendum B), the Regents Task Force recommends that teaching be established in law as a licensed profession, and that:

> "2. A system of licensing based on an examination, including an internship, be established and all who practice the profession of teaching be required to be licensed.
>
> "3. A professional practices board be established in law for the education profession. This board would be responsible to the Regents and would have such duties as determining the nature and scope of the licensing qualifications and examinations . . ."

This report demonstrates that in New York State, at any rate, the educational trend is exactly the opposite of that argued to the district court below in support of the modified plan.

CONCLUSION

For the reasons stated herein, as well as those given by the appellant Board of Examiners, the judgment appealed from below should be reversed.

Respectfully submitted,

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Dated: New York, New York
October 12, 1976

One For All-All For One

9/16/76 AMSTERDAM NEWS

We offer congratulations to Peter S. O'Brien and his Council of Supervisors and Administrators of the New York City School System for their overwhelming action in giving up their cost of living increases in pay in order that the money may be used to save the jobs of 300 of their fellow supervisors who otherwise would have lost their jobs under necessary budget cuts which the Board of Education would have been forced to make.

A few editions ago this newspaper, mindful of the precedent set by Mrs. Lillian Roberts and her hospital workers suggested that this would be a fair solution towards the resolution of the CSA problem.

At that time we urged Albert Shanker and his United Federation of Teachers' Union to turn down their increases in pay in order that the money be used to save the jobs of some 2,300 teachers who were faced with being cut off by the Board of Education because of the fiscal crisis.

We pointed out then, and we repeat it now, that the first job of a union leader, and indeed the principal objective of a labor union should be to keep as many of its members working at the highest wage possible.

Mr. O'Brien's union, which is not a part of Shanker's union, but which was faced with the same problem, has now acted in the best interest of all its membership by turning down their wage increases and saving the jobs of those who would have been fired.

We commend Peter O'Brien and the Council of Supervisors and Administrators just as we commended the hospital workers. And once more we say they have acted in the highest tradition of the trade union movement.

All that remains now is to hear from Albert Shanker and the UFT, who when last heard from, were still muttering fire and brimstone threats and adamantly refusing to give up any part of their high salaries to save the jobs of some 2,000 of their fellow workers.

If the CSA membership can do it, why can't Shanker?

ADDENDUM A

The Regents Tentative Statewide Plan For The Development of Postsecondary Education

1976

The Regents will hold hearings on this document on September 1 in New York City and on September 2 in Albany. For further information contact the Bureau of Postsecondary Planning, New York State Education Department (518: 474-7416)

The University of the State of New York
THE STATE EDUCATION DEPARTMENT
Albany, New York 12230
August, 1976

ADDENDUM B

Chapter 6

TEACHER EDUCATION AND CERTIFICATION: A DECADE OF TRANSITION

Overview

There are 1,960 programs to train school administrators, teachers, counselors, and other school staff members offered at 104 higher education institutions. Each year for the past five years, approximately one-quarter of the students awarded baccalaureate degrees from New York institutions had completed teacher education programs and were eligible for a provisional teaching certificate.

Good teacher education programs respond both to new developments in the areas of education and teacher training and to the varying needs of communities and schools throughout the State. In their 1972 Plan, the Regents called for revisions and strengthening of teacher education programs, commonly called competence-based teacher education. The college and university efforts to meet this call continue on schedule.

The need for responsive programs is made even more imperative by the slackening demand for teachers. Since 1971, the supply and demand ratio has been reversed. There are now more graduates of baccalaureate programs prepared for public school service than there are positions available. Although there is some evidence of a reduction in the number of persons seeking certification, the long term projections indicate a level of production that far exceeds the demand. These trends call for a review by institutions of the need for programs.

There will also be less staff turnover in the schools. More than half of the present public school staff members will still be

serving in the late 1990's. Almost three-quarters of the present staff have earned their permanent certification and thus have completed all required graduate study. Therefore, we can no longer rely on turnover and programs for advanced certification to upgrade public school services. In order to maintain quality educational programs for children and introduce new materials and methodologies into the schools, continued education of the existing staff will be required. Consequently, the establishment of a public policy on continuing education will be necessary.

The Regents urge a review of the allocation of scarce resources, but call for the continuation of institutional efforts to improve preparation for teaching which has been so evident in the colleges' universities'continued response to the Regents earlier call.

Regents Recommendations

1. *The Regents reaffirm the goal, as stated in the 1972 Statewide Plan, of establishing a system of certification by which the State can assure the public that professional personnel in the schools possess and maintain demonstrated competence to enable children to learn.*
2. *Colleges and universities preparing school personnel are urged to:*
   a) *Counsel students interested in teacher preparation about the supply-demand prospects for teachers.*
   b) *Consider consolidation or elimination of preparatory programs which show a low rate of placement in the public schools.*

c) *Identify supplementary or alternative career opportunities for persons enrolled in teacher education programs.*

To aid institutions in these efforts the State Education Department will:

- Use the Educational Manpower Information System (EMIS) to help monitor and evaluate recently revised preparatory programs.
- Publish and disseminate an annual report of its data indicating the number of persons prepared by registered programs and the number subsequently employed in the State's public schools.

3. *To supplement the available data related to the supply and demand for teachers, a biennial registration of all permanently certified school personnel should be established.*

Background

Revised Programs of Teacher Education

In the 1972 Statewide Plan the Regents enunciated a policy of teacher education and certification called "competency based teacher education," that has had far-reaching effects. The Regents note the progress that has been made in a difficult transition period and recognize the time and effort that hundreds of people have invested in the planning and development of these programs. Major first steps toward improving the preparation of personnel for the public schools have been taken through the joint efforts of school and college personnel. Table 1 below provides information on the status of action by the Department on revised programs submitted since February 1, 1975 The established time schedule for colleges to submit and initiate revised programs has been reasonably adhered to.

TABLE 1

SUBMISSION AND STATUS OF
REVISED PROGRAMS SUBMITTED
SINCE FEBRUARY 1, 1975

Certification Areas	No. of Insts. Expected To Submit Programs	No. of Insts. Submitting Programs	No. of Programs Submitted	Department Action			
				Registered	Withdrawn	Returned[2]	Under Review
TOTAL[1]	192	173	293	215	4	20.	54
Per Cent	-	-	100%	73.4%	1.4%	6.8%	18.4%

(1) Includes programs for teachers of elementary grades, teachers of handicapped, and school administrators.

(2) Found to be unacceptable, comments made and permission given to revise and resubmit without prejudice.
The State University Colleges at Buffalo and Fredonia were granted extensions of one year to submit revised programs because of severe problems related to collaboration among the schools, colleges and teacher representatives.

In November 1975, the Commissioner appointed a task force of 20 persons representing public school staff, collegiate staff, students, and lay persons to study the major issues in teacher education and certification and to recommend appropriate action to ensure the continued improvement of teacher education and certification. In a preliminary report, the Task Force has recommended that:

1. Teaching be established in law as a profession in a fashion comparable to the licensed professions.

2. A system of licensing based on an examination, including an internship, be established and all who practice the profession of teaching be required to be licensed.
3. A professional practices board be established in law for the education profession. The board would be responsible to the Regents and would have such duties as determining the nature and scope of the licensing qualifications and examination and the establishing of criteria for program registration, and acting on questions of ethical and professional conduct.

It is anticipated that the Task Force will make its final report at the end of 1976.

Supply and Demand

At present and for the foreseeable future, the number of graduates of teacher education programs significantly exceeds the positions available in the public schools as illustrated in the graph below. The gap shown between the number of positions available and the number of new graduates employed indicates that many positions are filled by persons with some experience.